YATES PETROLEUM CORP.

IBLA 85-393 Decided April 9, 1986

Appeal from that part of a decision of the New Mexico State Office, Bureau of Land Management, affirming as modified a Roswell, New Mexico, District Office determination to issue several incidents of noncompliance for operations conducted under oil and gas lease NM 558018 and impose assessments pursuant to 43 CFR 3163.3.

Affirmed as modified in part, reversed in part, and set aside and remanded in part.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties

   An assessment levied pursuant to 43 CFR 3163.3 as a result of an incident of noncompliance with an applicable regulation, lease term, or written order is not a penalty or fine. Rather, it is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of noncompliance. An assessment levied on the basis of a successive per-day amount may be reduced to a one-time charge to reflect a change in 43 CFR 3163.3.

2. Evidence: Burden of Proof--Oil and Gas Leases: Generally--Oil and Gas Leases: Incidents of Noncompliance

   A party challenging the factual basis for a written incident of noncompliance bears the burden of establishing by a preponderance of the evidence that conditions were not as stated on the face of the document.

3. Evidence: Presumptions

   Where the record does not indicate receipt of a document purportedly sent, a legal, but rebuttable, presumption exists that administrative officials did not receive the document.

4. Oil and Gas Leases: Civil Assessments and Penalties

   An assessment levied pursuant to 43 CFR 3163.3(a) is for failure to comply with a written order or instruction of the authorized officer within the time stated

for abatement or compliance. An assessment may be levied where compliance with an order or instruction is not achieved within the specified period regardless of the apparent gravity of the impact of the noncompliance.

5. Oil and Gas Leases: Generally--Oil and Gas Leases: Incidents of Noncompliance

An oil and gas lease operator has not complied with 43 CFR 3162.7(b)(6), requiring a storage area to be properly identified, if the identification sign does not bear the lease number. A sign affixed to a nearby operating well in accordance with 43 CFR 3162.6 does not satisfy 43 CFR 3162.7(b)(6).

6. Oil and Gas Leases: Generally--Oil and Gas Leases: Incidents of Noncompliance

An incident of noncompliance for failure to timely reclaim a working pit pursuant to a written order from BLM has not occurred where the Application for Permit to Drill states the pit is to be allowed to "dry out" before reclamation and evidence indicates the pit was saturated with fluids when the notice of an incident of noncompliance was issued.

7. Oil and Gas Leases: Generally--Oil and Gas Leases: Incidents of Noncompliance

Where evidence is presented by the appellant to overcome the presumption that the facts are correctly stated on a notice of an incident of noncompliance for operations conducted under an oil and gas lease and the record does not sufficiently support BLM's determination to issue the notice, the determination will be set aside.

8. Oil and Gas Leases: Civil Assessments and Penalties

When an oil and gas lease operator has failed to report an oil spillage as required by 43 CFR 3162.5-1(c) and has failed to respond to BLM instructions to report the amount of oil spilled in the monthly report of operations as required by 3162.4-3, these separate actions may be treated as separate incidents of noncompliance.

9. Oil and Gas Leases: Generally

Under the regulations in 43 CFR Subpart 3162 (Requirements for Lessees and Operators), an oil and gas lease operator is responsible for the submission of reports on the quantity of gas or oil produced.

10. Oil and Gas Leases: Civil Assessments and Penalties--Regulations: Generally

An assessment for failure to file production reports in a timely manner pursuant to 43 CFR 3163.3(h) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

APPEARANCES: A. J. Losee, Esq., Artesia, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Yates Petroleum Corporation (Yates) appeals from that part of a December 5, 1984, decision of the New Mexico State Office, Bureau of Land Management (BLM), to affirm as modified a decision by the Roswell, New Mexico, District Office, BLM, to issue several written notices for incidents of noncompliance (INC) and impose assessments as a result of the noncompliance.

On September 19, 1984, personnel from the Roswell District Office inspected the Union "SI" operations (wells #1 through #8) being conducted under the terms and conditions of oil and gas lease NM 558018. Yates is the designated lease operator. As a result of this inspection the BLM inspectors issued a written notice dated September 27, 1984, citing 33 separate INC's for violation of regulations and rules governing lease operations. The reasons for issuing the 33 INC's were discussed with Yates on October 1, 1984, and Yates was given 30 days to abate the noncompliance. A follow-up inspection was conducted by BLM on October 30, 1984, and BLM found 15 of the INC's to be unabated. As a result, the Roswell District Office proceeded to assess Yates pursuant to 43 CFR 3163.3 for each of the unabated INC's. In a decision dated November 2, 1984, Yates was notified that an assessment of $250 per INC would be levied for each successive day the violations remained unabated ($3,750 per day total). On November 16, 1984, Yates requested a technical and procedural review of the 15 INC's pursuant to 43 CFR 3165.3.

The New Mexico State Office reviewed all 15 contested INC's and in a December 5, 1984, decision, found in favor of Yates with respect to six of the INC's, effectively vacating these INC's. For the remaining nine, the State Office rendered the following determinations: 1/, 2/

1/ At the time of the Dec. 5, 1984, decision, continued nonabatement subjected a violator to civil penalties under the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1709 (1982). See 43 CFR 3163.4. The record discloses no civil penalties were considered or imposed by BLM. Moreover, application of administrative assessments under 43 CFR 3163.3 have since been suspended in part. 50 FR 11517 (Mar. 22, 1985).

2/ Since the decision was not adverse to Yates for the six INC's adjusted in its favor, we need not address those particular INC's as part of this appeal. The identifying numbers assigned for the remaining nine INC's made the subject of this appeal are stated in successive order for convenience in our discussion. We point out that the numbers assigned for our discussion will

(1) The first INC for failure to obtain approval for a pit (well #1) in violation of 43 CFR 3162.1. An assessment was levied for failure to gain approval for the pit within the time specified in the INC. Yates alleged it sent a request for approval to BLM on October 3, 1984. The State Office held that a request for approval of the pit was not received from Yates until November 9, 1984 (4 days after the time specified in the INC), and affirmed a $1,000 assessment ($250 per day for 4 days) pursuant to 43 CFR 3163.3(a).

(2) The second INC was for failure to report an oil spill (well #2) in violation of 43 CFR 3162.7-2. Yates admitted an overflow had occurred but asserted that, at the time of the review, it was in the process of filing a responsive report in compliance with the regulations and Notice to Lessee (NTL). The assessment was modified to a one-time charge of $100 pursuant to 43 CFR 3163.3(h).

(3) The third INC was for failure to report loss of oil (well #2) in the monthly report as required by 43 CFR 3162.4-3. Yates alleged this was issued as a result of the same incident discussed in paragraph (2) above. The State Office modified the District Office's continuing assessment of $250 per successive day of noncompliance by terminating the daily assessment as of November 16, 1984 (the date of request for technical review), plus the 10 days of technical review, for a total assessment of $5,500. The State Office also provided an additional 45 days to submit the amended monthly report.

(4) The fourth INC was issued for failure to post the lease number on the tank battery identification sign at well #2 in violation of 43 CFR 3162.7-4(b)(6). The number was added to the sign on November 10, 1984. Yates argued the regulation had been satisfied by a sign located at the wellsite, 160 feet from the tank battery. The State Office modified the assessment to a one-time $100 assessment levied under 43 CFR 3163.3(e).

(5) The fifth INC involved the surface collapse of a rat hole (well #4) in violation of 43 CFR 3162.5-1(a). Yates asserted the collapse did not result in the violation of an environmental obligation. It also argued the hole was filled on November 7, 1984. The State Office held the evidence indicated the hole was filled on November 9, 1984, and affirmed the $1,000 assessment ($250 per day for 4 days).

(6) The sixth INC was for accumulated trash and an unreclaimed reserve pit (well #5) in violation of the surface use plan agreement. Yates argues the surface owner requested the trash not be removed and the pit be allowed to dry before being leveled. The State Office concluded the trash was left at the request of the surface owner but that a violation existed until the

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fn. 2 (continued)
not correspond, for the most part, with those identifying numbers used in the Dec. 5, 1984, decision and Yates' statement of reasons. The failure of the District Office to assign any identifiable designation to the individual INC's for easy reference by the operator and reviewing officials necessitated our new identification of these INC's.

pit was leveled on November 10, 1984, and affirmed the assessment under 43 CFR 3163.3(a) for $1,250 ($250 per day for 5 days).

(7) The seventh INC was issued for an unapproved pit (well #6) in violation of 43 CFR 3161.1. Yates asserted this pit was the same pit cited in INC (8). It argued the time for abatement was not reasonable considering the surface owner's request that the pit be allowed to dry before leveling. The State Office held the pit violated operator requirements and affirmed the $1,250 assessment ($250 per day for 5 days).

(8) The eighth INC involved an ungraded reserve pit at well #6 in violation of the surface use plan agreement. Yates argued this pit was the same pit cited in INC (7). The State Office concluded they were two different pits and affirmed the $1,250 assessment ($250 per day for 5 days).

(9) The last INC reviewed had been issued for failure to furnish a proper report in violation of 43 CFR 3162.1 and 3162.7-2(a). Yates argued the LACT meter unit, owned and operated by Koch Oil Company (Koch), was disconnected in August 1984 and it was unable to obtain the proving reports from Koch. The State Office affirmed the District Office's citation for the failure to submit the information but modified the successive $250 per day assessment to a 22-day limit (November 5 through 16, 1984, plus the 10-day technical review period) for a total assessment of $5,500. It also allowed Yates an additional 45 days to submit the information.

The result of the State Office's decision was to uphold nine of the contested INC's and to adjust the total assessment levied against Yates to $16,950, dependent upon abatement of INC's (3) and (9).

In its statement of reasons, Yates argues the State Office decision affirming the District Office's decision should be reversed in part or, in the alternative, the assessments should be dismissed for those INC's where substantial compliance with the rules and regulations had occurred. Appellant also asserts all assessments should be reduced to reasonable sums reflective of actual damages. Appellant contends that BLM's assessments are truly penalties and should not be enforced because they do not represent reasonable estimates of damages usually anticipated for these types of INC's. Yates also disagrees with BLM's version of the facts stated in support of INC's (1) through (8). It asserts any factual disputes should be resolved in its favor because BLM has not shown by a preponderance of the evidence that Yates' statement of the facts is erroneous.

[1] Before reviewing the INC's individually, we will first address the question of what assessment is properly levied for an INC. Appellant charges that the amounts levied by BLM fail to reflect the intent of the regulations that such assessment be in the nature of liquidated damages. It asserts the assessments far exceed any damages possibly suffered by the United States as a result of the alleged violations. Appellant strongly emphasizes the United States is not the surface owner and that most of the alleged violations involve surface resources.

The applicable regulation, 43 CFR 3163.3, states in part:

> Certain instances of noncompliance result in loss or damage to the lessor, the amount of which is difficult or impracticable

> to ascertain. Except where actual losses or damages can be ascertained in an amount larger than that set forth below, the following amounts shall be deemed to cover loss or damage to the lessor from specific instances of noncompliance.

Although the probability of loss and damages would be greater if BLM were the surface owner, Yates has ignored the underlying fact that when an incident of noncompliance occurs, certain costs and expense are incurred, by BLM as a direct result of the incident which would not have been incurred but for the INC. BLM must take such steps and conduct additional physical inspections as are necessary to ensure the noncompliance is abated. These expenditures of time and funds are a direct result of the noncompliance.

These assessments are in the nature of liquidated damages and, therefore, we will not consider whether appellant is entitled to a reduction to reflect "actual loss or damage" to the environment. It is recognized that pursuant to 43 CFR 3163.1 BLM has the authority to choose not to levy an assessment. 3/ However, once a determination is made that an assessment should be imposed, there is no authority in the regulations to entertain a reduction of the stated dollar amount to an amount less than that called for in the regulation. The regulation at 43 CFR 3163.3 provides: "Except where actual losses or damages can be ascertained in an amount larger than that set forth below, the following amounts shall be deemed to cover loss or damage to the lessor from specific instances of noncompliance." (Emphasis added.) The mandated minimum amounts are $250 for assessments under 43 CFR 3163.3(a), (c), (d), (f), (g), (i), and (j), and $100 for 3163.3(e) and (h). A formula is presented for 3163.3(b) assessments (where abatement work is performed by BLM).

At the time the District Office inspected the lease area in September 1984 and violations were first identified, the regulation also provided that a specified "assessment shall be applicable to each successive day of noncompliance." 43 CFR 3163.3 (1983). However, this particular portion of the regulation was deleted by amendment effective October 22, 1984. See 49 FR 37361, 37365 (Sept. 21, 1984). In the present case, assessments were not levied by BLM until November 5, 1984, or after the effective date of the deletion of successive day assessments. In a letter dated January 18, 1985, BLM explained to counsel for Yates that the deleted provision was applied to these INC's because noncompliance was detected prior to the effective date of the regulation change.

Although the question may be posed, we need not address whether BLM should have applied the amended version of the regulation. It is a well-established policy that, in the absence of any intervening rights which would be adversely affected or countervailing public policy considerations, the Board will apply an amended regulation to benefit an appellant in a case pending before us. James E. Strong, 45 IBLA 386 (1980). 4/ The Board has

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3/ It seems appropriate at this time to note that no assessments were levied for the 18 INC's which were abated within the required time.

4/ BLM's position with respect to application of the amended regulation was set forth by the Director, BLM, in Instruction Memorandum (IM) No. 84-594,

previously held this amended version of 43 CFR 3163.3 may be properly recognized in cases pending before the Department where violations were detected and INC's issued before the effective date of the regulation change. E.g., Mont Rouge, Inc., 90 IBLA 3 (1985); Willard Pease Oil & Gas Co., 89 IBLA 236 (1985). BLM's decision is modified to the extent that any assessment for a confirmed violation is reduced to a one-time charge.

[2] This brings us to a discussion of whether the nine INC's now before us were technically correct. Yates contends BLM is responsible to establish, by a preponderance of evidence, the facts cited to support each violation. We cannot agree. There is an established legal presumption, which is rebuttable, that official acts of public officers are regular. Desert Survivors, 80 IBLA 111 (1984); Ralph Kubinski, 76 IBLA 224 (1983). Accordingly, the conditions stated on the face of an INC are presumed to be those encountered by BLM at the time of inspection. The burden to overcome by a preponderance of the evidence BLM's prima facie case that conditions existed which violated Departmental regulations and lease terms is upon the party challenging an INC.

[3] With respect to INC (1) Yates argues it had made a request for approval of the emergency pit at well #1 dated October 3, 1984, and this request was ignored by BLM. BLM's records do not contain a request made prior to the one contained in a letter dated November 7, 1984. Yates has furnished a copy of the October 3, 1984, letter, but has submitted no evidence that this earlier letter was received by BLM. Appellant contends the letter was placed in an envelope and mailed with a similar request for approval of an emergency pit at well #2, which was received by BLM on October 4, 1984, and subsequently approved.

In James Boatman, 87 IBLA 31, 33 (1985), we stated:

> When an appellant maintains that a document was sent to BLM, but BLM has no record of it, the presumption of regularity works against a finding that BLM received the document and subsequently lost it through mishandling. Glenn W. Gallagher, 66 IBLA 49, 51 (1982). Although the Board has held that the presumption of regularity may be rebutted, e.g., Bruce L. Baker, 55 IBLA 55 (1981); L. E. Garrison, 52 IBLA 131 (1981), the presumption is not overcome by a statement that a missing document was mailed to BLM.

Appellant has failed to adequately substantiate its claim that the October 3rd request for approval of the pit at well #1 was received by BLM.

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fn. 4 (continued)
Change 4, dated Apr. 16, 1985. The Director authorized State Directors of BLM, with respect to unsettled cases, to reduce or waive any assessment imposed for INC's arising before Oct. 22, 1984, taking into consideration five enumerated factors including "the fact that actions taken by this Bureau on and after October 27, 1984, eliminated daily assessments."

This particular assessment resulted from Yates' failure to abate the INC within the time specified by either requesting approval for or eliminating the unapproved structure within the allowed correction period. The record reveals the emergency pit at well #2 was approved October 17, 1984, and the operator's copy of the approval was received by Yates on October 19, 1984. There is no evidence to indicate appellant approached BLM regarding the status of the request for approval of the pit at well #1 after October 17, 1984 (which was during the allowed compliance period). In spite of the fact its request for approval of the pit at well #2 was returned approved while no information was forthcoming concerning the unapproved pit at well #1, Yates apparently did not deem it necessary to inquire as to the status of its request for approval of the pit at well #1, even though it was potentially liable for a failure to comply with the written order. The existing emergency pit at well #1 remained unapproved on November 2, 1984. Accordingly, an assessment was properly levied for failure to comply with a written order pursuant to 43 CFR 3163.3(a).

[4] Both INC (5) and INC (6) resulted from what Yates deems to be "de minimis" violations, and Yates argues an assessment should not be levied. The surface collapse at a rat hole on the well #4 site, which resulted in INC (5), was less than 12 inches deep and 14 inches in diameter, according to appellant. BLM's finding that the pit at well #5 (INC (6)) was not properly leveled, Yates asserts, resulted from windrows used to level the pit and prevent erosion. Appellant alleges these windrows were 6 to 10 inches deep, rather than a customary 4 to 6 inches. While such instances may seem insignificant to appellant, an assessment under 43 CFR 3163.3(a) constitutes damages for "failure to comply with a written order or instructions of the authorized officer * * * if compliance is not obtained within the time specified." Appellant was afforded a 30-day period to rectify the identified violations of proper operating procedures. The resulting assessments under 43 CFR 3163.3(a) represent liquidated damages for the costs incurred by BLM in the continued supervision to ensure the violations were abated. Appellant has not offered argument that these violations did not occur or that they had been corrected at the second inspection. Accordingly, it was within BLM's authority to levy an assessment and an assessment for these violations was properly levied.

[5] Yates contends INC (4) is technically flawed because a sign on well #2 was close enough to the tank battery to satisfy the requirements of 43 CFR 3162.7-4(b)(6). The notice of INC cited Yates for failure to include the lease number on the identification sign for the tank battery near well #2. Appellant claims the tank battery is only 160 feet from well #2, which was clearly marked with a sign containing the lease serial number. The regulation appellant was held to have violated, 43 CFR 3162.7-4(b)(6), reads in part: "All facilities at which oil is stored shall be clearly identified with a sign that contains the name of the operator, the lease serial number * * * [and] each storage tank shall be clearly identified by a unique number." Appellant assumes this regulation may be satisfied through compliance with 43 CFR 3162.6, which requires identification of each well site by lease serial number and well number. Since the two regulations presuppose separate and distinct functions to be identified, it is difficult to conclude

the requirement to identify storage facilities is satisfied by identification of a well site. Accordingly, we find BLM's rationale for issuing the INC to be correct. 5/

[6] Appellant asserts the pit identified by BLM in INC (8) was the remainder of the approved working pit at well #6 and that this area had been left to "dry out" prior to final grading. In its request for technical review, Yates explained its delay in leveling the pit was in accordance with a request by the surface owner that the pits be allowed to completely dry prior to reclamation. In an affidavit accompanying the statement of reasons, J. M. Jenkins, the surface owner, explained he made such a request and Yates had satisfactorily complied with his request. 6/

In addition, the Application for Permit to Drill (APD) stipulates "drilling" fluids "will be allowed to evaporate in the reserve pits until the pits are dry." Jenkins' wishes are further substantiated by an April 23, 1982, letter from Yates to the Minerals Management Service stating that pursuant to a verbal agreement between Jenkins and Yates, pit areas would not be leveled until "after they are dry."

Yates' allegation that the pit area was still "wet" with fluids and could not be reclaimed at the time specified by BLM is also substantiated by BLM's issuance of INC (7) and another INC which was vacated by the State Office decision. INC (7) was issued for an unapproved pit which BLM described as being within the confines of the unreclaimed reserve pit at well #6 and the vacated INC was for fluid within such pit (determined by the State Office to be composed of mostly sediment and water).

These facts would indicate Yates was unable to reclaim the reserve pit without conflicting with Jenkins' request or violating other provisions of the APD. In light of these circumstances, we reverse BLM's decision to levy an assessment and vacate INC (8). 7/

[7] Appellant asserts the issuance of INC (7) is based on an incorrect factual presumption. BLM issued the INC for an unapproved pit at well #6. The pit is identified by BLM in the December 5, 1984, decision as being constructed within the confines of the unreclaimed reserve pit which is the focus of INC (8). Yates argues in rebuttal to BLM's classification of the

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5/ The State Office modified the assessment levied for INC (4) to $100. Since assessments under Subpart 3163 and discretionary, see 43 CFR 3163.1, BLM elected to assess under 43 CFR 3163.3(e) rather than 3163.3(a).

6/ This situation is similar to that which BLM encountered with an INC vacated by the decision following the technical and procedural review. In that INC Yates had been cited for surface clutter but Jenkins had previously requested that the surface clutter be left alone. In its decision the State Office concluded the BLM inspectors "should concur with the private surface owner's request."

7/ In this regard, Special Approval Stipulation M.2.d. to the APD called for the abandonment stipulations to coincide with operator-landowner agreements. Those agreements between the landowner and operator, not in conflict with specific regulatory or statutory language, would therefore control.

pit as unapproved by asserting that INC's (7) and (8) involve the same pit located in one of the four pit areas described in the APD for well #6, approved by BLM on May 10, 1982.

The size and characteristics of operational pits for well #6 were not defined in the APD, except for a sketch depiction of the well site found in Exhibit C. The INC in question was originally stated by BLM to be: "Well No. 6. 28. Unapproved pit. Request approval immediately or close pit within 48 hours of receipt of this notice. (Violates NTL 28)." The district office later furnished the following rationale for issuance of this particular INC:

> 43 CFR 3162.1 stipulates that "The lessee shall comply with * * * NTL's * * *." NTL-2B specifies that Lessees and operators shall comply with the following:
>
> > "All produced water * * * must be disposed of by * * * (3) other acceptable methods. All such disposal methods must be approved in writing by the District Engineer."
>
> Inspection and photo show an emergency pit located at well #6.
>
> There was no approval for the pit in our files and the lessee failed to request approval within 30 days after notification, or to close the pit.

(Nov. 16, 1984, Memorandum to State Director from Roswell District Manager, Assessment Rationale, at 3).

There is no other basis for BLM's decision in the record. It does not explain why a pit within the reserve pit area would constitute an emergency pit nor does it identify the emergency situation. In light of arguments presented by appellant, the rationale provided by BLM for its decision is insufficient to support its conclusion that INC (7) was properly issued. Since we cannot determine the propriety of this INC on the basis of the record before us, we set aside the decision as to INC (7) and remand the issue for reconsideration by BLM. If BLM chooses to uphold the INC, it should support its decision and provide answers to several questions. For example, BLM should consider whether an emergency pit was necessary. If an emergency condition did exist, was the operator authorized to remedy the situation by constructing this pit? Finally, since this pit was in a pit construction area, why was this pit in violation of the APD? Any BLM decision upholding the INC should answer these and the other questions relating to the pit's existence which were raised by appellant and the Board.

[8] In its statement of reasons appellant did not contest the factual basis for issuance of INC's (2), (3), and (9). Yates, however, did previously challenge issuance of INC's (2) and (3) as being duplicative. The common basis for issuance of these two INC's was an unreported oil spill at well #2. BLM issued INC (2) for noncompliance with 43 CFR 3162.7-2 because Yates did not report what is either one or several spills at well #2. INC (3) was issued because the amount of oil lost from the spill or spills

was not included in the monthly report of operations required under 43 CFR 3162.4-3. Yates has not denied oil spillage occurred or it failed to properly report such events. Rather it argues the two INC's are fundamentally grounded on the same authority, NTL 3-A, and on Yates' failure to fully disclose the details of the oil spillage at well #2. However, we find that INC's (2) and (3) were issued for separate and distinctive reasons.

43 CFR 3163.3(h) provides for an assessment in the amount of $100 for "failure to maintain records and file required reports, records, samples, or data as required by the regulations in this part and by applicable orders and notices." BLM cites 43 CFR 3162.7-2 as authority for the required reporting of an oil spill. This regulation focuses upon measurement of oil production and instructs the authorized officer to prescribe a method of measurement where oil spillage or leakage has occurred. The rationale for INC (2) stated by the District Office in its November 16, 1984, memorandum to the State Office was that NTL 3-A instructs operators to submit a written report of oil spills within 15 days of the event. When Yates did not timely report the incident, it had failed to comply with the applicable rules. The obvious intent of this rule is to encourage prompt disclosure of such situations. Because the mandatory information was not voluntarily provided and BLM had to contact Yates for the report, 43 CFR 3163.3(h) was applied and $100 assessed against Yates.

43 CFR 3162.4-3 describes a monthly report of operations required of all operators such as Yates. In subsection (d), the regulation lists the quantity of oil produced as a fundamental item of that report, but does not expressly address recordation of oil spillage occurrences. In its November 16, 1984, memorandum the District Office explained the actual basis for issuance of INC (3) was a provision in NTL 3-A of the lease requiring all volumes of oil, including oil spilled, to be reported on the monthly report of operations. BLM did not assess Yates under 43 CFR 3163.3(h) for failure to maintain the monthly report, but instructed Yates to amend a previously submitted monthly report to account for oil spilled at well #2. BLM permitted Yates 30 days to comply with its instructions. However, Yates did not amend the monthly report within the allowed period. BLM assessed Yates $250 under 43 CFR 3163.3(a) for this INC because Yates failed to comply with written instructions.

We cannot agree with Yates that these two INC's constitute the same act of noncompliance. INC (2) involves a failure to report conditions at the well area which may adversely affect operations or present environmental problems of which BLM should immediately be apprised, while INC (3) involves a failure to report an amount of oil for which royalties and other operating data must be calculated when the appropriate information has been received. The two functions are not related as two separate reports are called for. Accordingly, we find these two INC's are proper application of the regulations. Further, under the circumstances, assuming for the moment that they were, it was within BLM's power to levy two assessments, the first for failure to report (43 CFR 3163.3(h)), and the second for failure to abate the INC within the specified time period (43 CFR 3163.3(a)).

[9] We find no argument from appellant suggesting the incident cited in INC (9) did not occur. Yates, the operator under oil and gas lease NM 558018, is responsible for compliance with all regulations, instructions, and notices pertaining to its lease operations. The regulations require an operator to maintain records on the quantity of oil and gas produced and other incidental information. See 43 CFR 3162.4-3, 3162.7-2, 3162.7-3(b)(5). Yates, therefore, was responsible for maintaining the LACT meter unit providing reports at issue here. Yates does not deny this information was not timely furnished to BLM. Appellant questions the propriety of the assessment where the information sought was held by another party. If appellant is of the opinion that a third party caused the abrogation of this responsibility, it may desire to pursue a remedy from that party. However, the distinct issue here is appellant's own failure to provide upon request information for which it was responsible. We conclude INC (9) was properly issued.

* [10] On March 22, 1985, BLM suspended the use of assessments for noncompliance pursuant to 43 CFR 3163.3(c) through (j), except where actual loss or damage could be ascertained, 50 FR 11517 (Mar. 22, 1985). This suspension was implemented by IM No. 85-384 (Apr. 16, 1985), as follows:

> Enclosed is a copy of the Notice of Intent to propose rulemaking which was published in the Federal Register on March 22, 1985. As stated in this notice, the following actions are hereby taken:
>
> ○ The assessment for noncompliance provisions under 43 CFR 3163.3(c) through (j) are suspended, except where actual loss or damage can be ascertained.

On January 30, 1986, BLM proposed rules to clarify the operational requirements of the Federal Oil and Gas Royalty Management Act contained in 43 CFR Part 3160, 51 FR 3882 (Jan. 30, 1986). The proposed rules would eliminate the assessment for failure to properly identify a production facility under 43 CFR 3163.3(e) or for the failure to file reports in a timely manner under 43 CFR 3163.3(h). In the preamble to the proposed regulations BLM states: "Assessment under the various Acts authorizing the leasing of minerals would be modified by the proposed rulemaking to eliminate automatic assessments for noncompliance involving violations of §§ 3163.3(d), (e), (g), (h), and (j) of the existing regulations." (Emphasis added.) 51 FR 3887 (Jan. 30, 1986). Therefore, under the proposed rules BLM would not automatically assess Yates but would be required to give Yates notice that it had not properly identified a production facility or violated the reporting requirements.

We recognize that 43 CFR 3163.3(e) and 43 CFR 3163.3(h) were in effect at the time BLM took its action, and neither the suspension nor the proposed regulations are clearly dispositive herein. They do, however, reflect the Department's present policy concerning the levy of an assessment for failure to comply with the identification and the reporting requirements. In the past this Board has applied the present BLM policy to a pending matter, if to do so would benefit the affected party, and if there were no countervailing laws, public policy reasons, or intervening rights. Somont Oil Co., Inc.,

91 IBLA 137 (1986). For that reason, we vacate the decision to levy assessments pursuant to 43 CFR 3163.3(e) and 43 CFR 3163.3(h). 8/

By way of summary, we find assessments appropriately levied against Yates to be: INC (1), failure to comply with instructions to level unapproved pit or obtain approval, $250; INC (3), failure to comply with instructions to amend monthly report, $250; INC (5), failure to comply with instructions to remedy surface collapse, $250; INC (6) failure to comply with instruction to level pit, $250; and INC (9) failure to comply with instruction to provide LACT meter proving reports, $250. Assessments for INCs (2) and (4) are vacated for the reasons above stated. We find INC (8) was improperly issued because compliance would conflict with other APD obligations of the operator. We also conclude the factual background on INC (7) is insufficient to support its issuance. As a result, we find assessments in the amount of $1,250 are properly levied against Yates.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified for INC's (1), (2), (3), (4), (5), (6), and (9); reversed for INC (8); and set aside and remanded for INC (7).

R. W. Mullen
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge

8/ The assessments were levied pursuant to 43 CFR 3163.3(c) and 43 CFR 3163.3(h). Had BLM elected to assess pursuant to 43 CFR 3163.3(a), assessments would not be vacated by this Board.